IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 37

ALLEN I. NILVA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

EUGENE GRESSMAN
1701 K Street, N. W.
Washington 6, D. C.

JOHN W. GRAFF
1220 Minnesota Building
St. Paul 1, Minnesota
Counsel for Petitioner

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This reply brief is directed solely to the Government's contention in its brief (pp. 15-25) that petitioner was properly adjudged guilty of contempt for failure to produce the records referred to in the third specification.

It is said that the facts necessary to make out a prima facie case of such a contempt were established

by the record made at the contempt hearing. The erroneousness of this contention, however, is readily demonstrable from an examination of the record.

Subpoena duces tecum No. 160, which formed the basis for the third specification of contempt, called for the production of "all invoices, bills, checks, slips, papers, records, letters, ledger sheets, bookkeeping records, journals and copies thereof between, by or concerning Mayflower Distributing Company, made, entered, sent or received from July 1, 1950, through April 30, 1951, both dates inclusive, reflecting any and all purchases, sales, trades, exchanges or transfers, both domestic and foreign of any and all slot machines, flat-top or console, coin-operated device, whether new or used with any persons, firm or concern." (R. 24-25).

This was obviously not a precisely-worded subpoena, spelling out with particularity the items requested. It was a fishing expedition designed to produce whatever might turn up, from which evidentiary materials might subsequently be used. See *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 221. Its broadness and lack of particularity are underscored by the preciseness which characterizes the third specification of contempt, a specification which itemizes twenty-two specific records which petitioner allegedly did not produce. (R. 3-4).

The important point here, however, is that the very broadness of the subpoena had a fatal impact upon the proof adduced by the Government at the contempt trial. Such a subpoena made it necessary not only that there be proof of the existence of pertinent documents unproduced by petitioner but also that there be proof that the documents mentioned in specification

No. 3 were within the scope and intendment of subpoena duces tecum No. 160. But quite plainly there was no such proof as would support petitioner's conviction under the third specification.

The Government relies upon the assertion (Brief, p. 17) that the existence of the records, enumerated in the third specification, "was shown by the fact that they were present in the courtroom when the contempt hearing commenced (R. 42, 58-59), and that four were formally introduced in evidence (R. 59)." But apart from three of the four records that were introduced by petitioner, there was no identification or proof that any of the other nineteen items mentioned in the third specification were on the counsel table or elsewhere in the courtroom. Nor was there any indication that any of the records on the table were records that petitioner had failed to produce under the subpoena or that lay within the scope of the subpoena. What was on the table had apparently been seized under the impounding order but nobody could or did say that the records required by supoena duces tecum No. 160 were included therein. As stated by petitioner's counsel near the close of the contempt hearing (R. 58-59):

> With respect to the rest of the exhibits here, I must respectfully tell the Court that I have not had time to make any examination of them but apparently they constitute a portion of the records which were impounded by order of this Court. That includes what else is on the table, Your Honor. I have likewise had no opportunity to examine the records which were introduced as evidence in the [criminal conspiracy] case, so I am unable to question this witness [petitioner] concerning them.

To say that the records present in the courtroom were the records enumerated in the third specification is thus to indulge in the sheerest speculation unsupported by any proof or admission. Whatever admissions petitioner made as to documents he did not produce had no reference to the existence of the pertinent documents or as to their relevance under the terms of subpoena duces tecum No. 160. Thus his admission (R. 42-43) that he had not brought any of the "rather formidable display of records" on the table in the courtroom could not serve to prove that the documents listed in the third specification were on the table or that such documents were otherwise in existence.

No effort was ever made by the Government to show that any of the twenty-two items enumerated in the third specification were in existence or that they had been seized under the impounding order. There was no proof as to the circumstances or nature of the seizure of these items, if indeed they were seized, so as to indicate that they were accessible to petitioner in the course of his search.

The undeniable fact that three of the items mentioned in the specification were introduced into the record through the petitioner does not serve to prove the Government's case. The first of these items was described in the third specification as "General ledger 1950" (R. 3). Such a ledger obviously was in existence. But further proof was required to show that it came within the broad terms of subpoena duces tecum No. 160, that it reflected transactions of new or used "slot machines, flat-top or console, coin operated device" between the dates of "July 1, 1950, through

April 30, 1951." As stated by petitioner's counsel (R. 32-33), "in order to determine whether that ledger is an item which is requested by this subpoena, the ledger will have to be searched to find out whether that general ledger comes within this category that I have just read." Conceivably the general ledger might not have referred to sales or purchases of slot machines or other coin-operated devices.

Certainly petitioner's testimony did not prove the pertinence of the 1950 ledger under the subpoena. All that the record shows is the following question and answer (R. 46):

> Q. Now, do you know of your own knowledge whether Respondent's Exhibit No. 1 contains any records pertaining to new and used slot machines during the period—the end period is April 30th, the beginning period is July 1, 1950?
> A. No, I do not, sir.

As to the second item mentioned in specification No. 3, described as "General ledger 1951" (R. 3), the following testimony was given by petitioner (R. 46):

> Q. Now, can you tell us at this time whether Respondent's Exhibit No. 2 contains any record pertaining to new and used slot machines covering the period of July 1, 1950, to April 30, 1951?
> A. No, sir, I cannot tell you whether it does.

The third item referred to in the specification, described as "Journal 1950-1951" (R. 3), was the subject of the following testimony by petitioner (R. 47):

> Q. Now, can you tell from an examination of Respondent's Exhibit 3 whether that contains any records pertaining to new or used slot machines during the period of July 1, 1950, to and including April 30, 1951?

Mr. Dibble: I object to it—

A. (Interrupting) No, I cannot, sir.

The Court: Wait just a minute.

Mr. Dibble: I object to the question as being without foundation. There hasn't been any testimony that he has examined that record.

Q. (By Mr. Graff): Have you examined Respondent's Exhibit 3?

A. Yes, sir, I have examined this record, as well as the others, and from my examination—no, let me say, I examined those other two records previously and was unable to find any evidence of slot machines—

The Court: You are being asked about Respondent's Exhibit 3, the one you have in your hands now, Mr. Nilva.

A. Let me just look at it. (Witness examines said exhibit.) This one I have not examined.

The Court: The objection is sustained.

Q. (By Mr. Graff): So you don't know whether that contains any records pertaining to new or used slot machines?

A. That is correct, sir.

The fourth item mentioned in the specification, the "Check Register 1950-1951" (R. 3), was not introduced through petitioner, though the check register for the period from February 1, 1952, to January 31, 1953, was introduced as his fourth exhibit. His testimony concerning that exhibit did not admit or reveal its relevance under subpoena duces tecum No. 160. He merely stated that he had not examined it prior to April 1, 1954 (R. 48).

The Government, of course, introduced no proof whatever in connection with these four items and petitioner's testimony was in all respects uncontradicted

and unchallenged. Hence there is no evidence in the record that these four items were within the scope of the subpoena or that they should have been produced pursuant to that subpoena. When coupled with the utter lack of any evidence as to the existence or relevances of the other nineteen items in the specification, this evidentiary void becomes decisive.

There was no basis for the trial judge, as the trier of facts, to conclude from the testimony as to these four items that the documents were relevant to the demands of the subpoena. Many thousands of documents had been seized by the Government under the impounding order (S. R. 34) and Government agents clearly had to use their discretion and judgment in determining what documents were in any way relevant. The twenty-two documents enumerated in the third specification represented someone's judgment as to what was required to be produced from the thousands of seized records. But such a judgment could not be accepted automatically by the District Court. Proof was required to demonstrate the accuracy of that judgment and to show that the documents did in fact relate to the subject matter of the subpoena. No such proof was forthcoming.

There was not even any reference at the contempt hearing, let alone proof, as to the court order of March 29, 1954, which the third specification also alleged had been disobeyed (R. 3) and which formed part of the basis of petitioner's conviction under that specification (insert page opposite R. 67). The contempt record is entirely devoid of any proof of what that order provided, to whom it was directed, and whether it spoke in terms of the subpoena or in more specific

language. The Government in its brief significantly makes no effort to explain this glaring omission of proof of a basic element of the third specification.

This absence of basic evidence is underscored by the further failure to disprove that petitioner—in the circumstances of this case—made a good faith effort to find the documents. The broadness of the subpoena, the fact that the subpoena was directed to the corporation rather than to petitioner, the nominal nature of petitioner's relationship to that corporation, petitioner's lack of custody and knowledge of the records, and the voluntariness of his appearance in answer to the subpoena, all made it appropriate to test the willfulness of the alleged disobedience and the existence of an "adequate excuse" by the standards of good faith. But before petitioner's testimony as to his good faith could be challenged or disproved, it was essential to show that the records for which he is to be held accountable were in existence and were required to be produced under the terms of the subpoena. Neither element was proved in this case beyond a reasonable doubt.

In the light of such a record, petitioner is entitled to a judgment of acquittal on the third specification of contempt. The Government has sought and failed to prove the essential ingredients of a criminal contempt under that specification. It did not even prove a prima facie case. A judgment of acquittal is thus mandatory.

It should also be noted that the procedural inequities which marked the efforts to prove the first specification also affected the proceedings with relation to the third specification. What the Government basically

relied upon in the contempt trial as to all three specifications was the judge's personal knowledge of events preceding that trial. No effort was made to comply with the requirement of Rule 42(b) that petitioner be confronted with the evidence against him as to the alleged contempts. No effort was made to produce and confront him with evidence of the existence of the twenty-two items mentioned in the third specification and of their relevance under subpoena duces tecum No. 160.

Nor can it be said that the introduction of Peterson's testimony—which the Government concedes was improper—had no relevance to the third specification. In seeking to introduce the transcript of that testimony, counsel for the Government asserted "that the records of which we are talking and of which Respondent's Exhibits 1, 2, 3 and 4 are a part are the same records that were brought into court and from which Mr. Peterson testified he received his information." (R. 59). In other words, the Government was apparently seeking to use the Peterson testimony partly to prove the nature of the documents mentioned in the third specification and their pertinence to subpoena duces tecum No. 160. As the Government now states (Brief p. 22, fn.), Peterson's testimony "was based upon summaries made from records which were *either in evidence or physically before the court.*" (Emphasis added.) And those summaries were obviously related to the substance or contents of the records.

The procedural error of introducing the supplementary record before the Court of Appeals also infected the third specification. The Government concedes (Brief, p. 24, fn. 7) that this record was used as to the

third specification "to bring before that court the formal matters, such as the April 15 hearing, which were matters of record known to all parties in the District Court." The fact that these formal matters may have been known to all parties does not excuse the failure properly to introduce such matters into the record before the District Court. Nor does that fact add to the power of the Court of Appeals to implement the record or consider matters not formally before the District Court. Moreover, since the counsel representing petitioner at the contempt hearing had no connection with the April 15 hearing, it cannot be assumed that the failure to introduce the transcript of that hearing at the contempt trial was non-prejudicial to petitioner.

The substantive and procedural defects as to the third specification of contempt are so clear as to warrant reversal of the conviction based on that specification and to order that a judgment of acquittal be entered. And since the Government does not "undertake to sustain the convictions on two of the specifications" (Brief, p. 26)—the first two—it becomes appropriate to reverse the entire conviction and to order a judgment of acquittal as to all three specifications of contempt.

For these reasons, as well as those set forth in petitioner's main brief, the judgment below should be reversed in its entirety.

Respectfully submitted,

EUGENE GRESSMAN
1701 K Street, N. W.
Washington 6, D. C.

JOHN W. GRAFF
1220 Minnesota Building
St. Paul 1, Minnesota
Counsel for Petitioner

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